

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO.1768 OF 2021

Nilesh Bansilal Gaywal @ Ghaywal ...Petitioner
vs.
The State of Maharashtra and Others ...Respondents

Mr. Satyavrat Joshi i/b. Mr. Sumant Deshpande, for the Petitioner.
Mrs. M.H. Mhatre, APP for the Respondent-State.

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CORAM : **S.S. SHINDE &
N.J. JAMADAR, JJ.**

JUDGMENT RESERVED ON : 14th JULY, 2021
JUDGMENT PRONOUNCED ON: 2nd SEPTEMBER, 2021

JUDGMENT : (Per N.J.Jamadar, J.)

1. Rule. Rule made returnable forthwith and, with the consent of the counsels for the parties, heard finally.

2. The petitioner who is detained under an order dated 2nd March, 2021 passed by the District Magistrate, Pune under section 3 of the Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug-Offenders, Dangerous Person, Video Pirates, Sand Smugglers and Persons Engaged in Black-Marketing of Essential Commodities Act, 1981 (MPDA Act) has assailed the legality and correctness of the detention order.

3. The respondent No. 2 invoked the provisions of MPDA

Act on the premise that the petitioner was a dangerous person and committing criminal activities by using deadly weapons. The petitioner had created a reign of terror in the jurisdiction of Koregaon Park and Lakshar police stations within the jurisdiction of Commissioner of Police, Pune and Bhigwan police station. The petitioner has allegedly become a perpetual danger to the lives and properties of the people residing and carrying out their daily activities and avocations in the said jurisdiction. It was alleged that the petitioner and his accomplices roamed around armed with deadly weapons and committed grave offences of dacoity, extortion and kidnapping.

4. The proceeding for detention came to be initiated against the petitioner on the basis of predicate offence being C.R. No.441 of 2020 registered with Bhigwan police station. The First Informant in the said crime reported that he had got a tender for work of filling laterite soil (murum) through the petitioner's source. Certain payments were due. When he demanded the balance payment, the petitioner called him at Bhigwan, under the pretext of settlement, kidnapped and assaulted him by means of iron rod and sticks and gave threats to eliminate him. Thus, the Informant lodged report with Bhigwan police station for the offences punishable under section 364A, 387, 324, 143, 147, 148, 149, 504,

506, 507 read with 34 of Indian Penal Code (the Code) and section 3 read with 25 of Arms Act, 1959 against the petitioner and his accomplices.

5. The detaining authority claimed to have recorded in camera statement of two witnesses as on account of reign of terror created by the petitioner, persons were not willing to come forward due to fear of reprisal. On the basis of aforesaid crime registered against the petitioner and the confidential statements of two witnesses, the detaining authority professed to record a subjective satisfaction that the petitioner was acting in a manner prejudicial to the maintenance of public order and it was necessary to detain the petitioner to prevent him from acting in a manner prejudicial to the public order, in future, by invoking the provisions contained in section 3 of the MPDA Act. The petitioner was served with the grounds of detention on 2nd March, 2021 itself.

6. The petitioner has invoked the writ jurisdiction of this Court asserting that the impugned order of detention suffers from the vice of arbitrariness and non-application of mind by the detaining authority. No act is attributed to the petitioner which can be termed to be prejudicial to the maintenance of public order. The narration of the facts pertaining to C.R.No.441 of 2020 and the confidential statements of witnesses, even if taken at par, do not

indicate that the acts and conduct attributed to the petitioner would fall within the ambit of public order. On the contrary, the initiation of the proceeding for detention was driven by the fact that the petitioner was granted anticipatory bail in the predicate offence i.e. C.R.No. 441 of 2020. Multifarious grounds which, according to the petitioner, render the impugned order legally unsustainable are raised in the petition.

7. An affidavit in reply is filed on behalf of the respondents in justification of the detention order. The respondents have endeavoured to refute the grounds on which the detention order is assailed.

8. In the light of the aforesaid facts and pleadings, we have heard Mr. Satyavrat Joshi, the learned counsel for the petitioner, and Mrs. Mhatre, learned APP for the State at length.

9. With the assistance of the counsel for the parties, we have also perused the material on record including the original record tendered for the perusal of the Court.

10. Though multi-fold grounds are raised in the petition, Mr. Joshi, the learned counsel for the petitioner, restricted the challenge primarily to three grounds. First, the acts and conduct attributed to the petitioner, in the backdrop of the material on the basis of which the detention order is passed, by no stretch of

imagination, can be said to be such as to be prejudicial to the maintenance of public order. Secondly, the reliance on the in-camera statements of two witnesses is of no assistance to the detaining authority as there was no verification of the in-camera statements by the detaining authority to the effect that it believed the incident reported therein to be true and correct. Thirdly, the material variance in the grounds of detention furnished to the petitioner in English and Marathi version vitiates the detention as the petitioner could not make an effective representation against the order of detention on account of infirmities in the translation.

11. In opposition to this, Mrs. Mhatre, learned APP would submit that the detaining authority has considered all the relevant material and recorded the subjective satisfaction that the detention of the petitioner was necessary in order to prevent him from acting in a manner prejudicial to the maintenance of public order. The subjective satisfaction arrived at by the detaining authority can not be tested in exercise of extraordinary writ jurisdiction. Thus, according to Mrs. Mhatre, no fault can be found with the impugned order on the said count. Mr. Mhatre further submitted that neither there is format in which the detaining authority should verify the truthfulness of the in-camera

statements nor is it a requirement of law that the detaining authority should itself verify the truthfulness thereof from the witnesses personally. Since the petitioner does not claim that he cannot follow Marathi, minor variance in the English and Marathi version of the grounds of detention, in the circumstances of the case, according to Mrs. Mhatre, cannot be said to have caused any prejudice to the petitioner in making an effective representation against the order of detention.

12. We have given our anxious consideration to the rival submissions canvassed across the bar. Upon consideration of the material on record and the aforesaid submissions, in our view, this petition can be determined on the substantive ground as to whether the acts and conduct attributed to the petitioner affected or were likely to affect adversely the maintenance of public order and, consequently, whether the invocation of the provisions under section 3 of the MPDA Act is justifiable ?

13. To start with, it would be imperative to note that under section 2(a) of the MPDA Act, acting in any manner prejudicial to the maintenance of public order, in the case of “dangerous person”, means, when he is engaged or is making preparation for engaging, in any of his activities as a dangerous person, which

affect adversely, or are likely to affect adversely, the maintenance of public order. Clause b(i) of section 2 defines a “dangerous person” to mean a person, who either by himself or as a member or leader of a gang, habitually commits, or attempts to commit or abets the commission of any of the offences punishable under Chapter XVI or Chapter XVII of the Indian Penal Code or any of the offences punishable under Chapter V of the Arms Act, 1959.

14. From a conjoint reading of the provisions contained in Clause a(iv) and (b-1) of section 2 and 3(1) of the MPDA Act, it becomes abundantly clear that when action of preventive detention is initiated against a person, on the premise that he is a dangerous person, twin conditions are required to be satisfied. One, there must be material to justify the designation of such person as dangerous person. Two, such dangerous person should have indulged in activities which effect adversely or likely to affect adversely the maintenance of public order. When these two conditions are fulfilled the detaining authority shall further be satisfied that it is necessary to detain such dangerous person to prevent him from acting in any manner prejudicial to the maintenance of public order.

15. Mr. Joshi, learned counsel for the petitioner vehemently submitted that the impugned order suffers from a singular infirmity of not advertent to the distinction between threat to public order and breach of law and order. At best, the acts and conduct attributed to the petitioner can be said to be the instances of breach of law and order, which can be legitimately addressed by resorting to the penal provisions. In the absence of material which would unmistakably demonstrate that the activities of the petitioner were prejudicial to the maintenance of public order, the resort to the provisions of preventive detention which impinge on the fundamental rights of the petitioner is wholly unsustainable, urged Mr. Joshi.

16. In order to lend support to the aforesaid submission revolving around essential distinction between 'public order' and 'law and order', Mr. Joshi placed a strong reliance on a four Judge Bench Judgment of the Supreme Court in the case of **Arun Ghosh vs. State of West Bengal**¹ wherein the distinction between law and order and public order was illuminatingly postulated with illustrations. The observations in para 3 are instructive and thus extracted below:

1 1970(1) SCC 98.

3. The submission of the counsel is that these are stray acts directed against individuals and are not subversive of public order and therefore the detention on the ostensible ground of preventing him from acting in a manner prejudicial to public order was not justified. In support of this submission reference is made to three cases of this Court: *Dr. Ram Manohar Lohia v. State of Bihar*; *Pushkar Mukherjee and Others v. State of West Bengal* and *Shyamal Chakraborty v. The Commissioner of Police, Calcutta and Another*. In *Dr. Ram Manohar Lohia's* case this Court pointed out the difference between maintenance of law and order and its disturbance and the maintenance of public order and its disturbance. Public order was said to embrace more of the community than law and order. Public order is the even tempo of the life of the community taking the country as a whole or even a specified locality. Disturbance of public order is to be distinguished from acts directed against individuals which do not disturb the society to the extent of causing a general disturbance of public tranquility. It is the degree of disturbance and its affect upon the life of the community in a locality which determines whether the disturbance amounts only to a breach of law and order. Take for instance, a man stabs another. People may be shocked and even disturbed, but the life of the community keeps moving at an even tempo, however much one may dislike the act. Take another case of a town where there is communal tension. A man stabs a member of the other community. This is an act of a very different sort. Its implications are deeper and it affects the even tempo of life and public order is jeopardized because the repercussions of the act embrace large Sections of the community and incite them to make further breaches of the law and order and to subvert the public order. An act by itself is not determinant of its own gravity. In its quality it may not differ from another but in its potentiality it may be very different. Take the case of assault on girls. A guest at a hotel may kiss or make advances to half a dozen chamber maids. He may annoy them and also the management but he does not cause disturbance of public order. He may even have a fracas with the friends of one of the girls but even then it would be a case of breach of law and order only. Take another case of a man who molests women in lonely places. As a result of his activities girls going to colleges and schools are in constant danger and fear. Women going for their ordinary business are afraid of being waylaid and

assaulted. The activity of this man in its essential quality is not different from the act of the other man but in its potentiality and in its affect upon the public tranquility there is a vast difference. The act of the man who molests the girls in lonely places causes a disturbance in the even tempo of living which is the first requirement of public order. He disturbs the society and the community. His act makes all the women apprehensive of their honour and he can be said to be causing disturbance of public order and not merely committing individual actions which may be taken note of by the criminal prosecution agencies. It means therefore that the question whether a man has only committed a breach of law and order or has acted in a manner likely to cause a disturbance of the public order is a question of degree and the extent of the reach of the act upon the society. The French distinguish law and order and public order by designating the latter as order public. The latter expression has been recognised as meaning something more than ordinary maintenance of law and order. Justice Ramaswami in Writ Petition No. 179 of 1968 drew a line of demarcation between the serious and aggravated forms of breaches of public order which affect the community or endanger the public interest at large from minor breaches of peace which do not affect the public at large. He drew an analogy between public and private crimes. The analogy is useful but not to be pushed too far. A large number of acts directed against persons or individuals may total up into a breach of public order. In Dr. Ram Manohar Lohia's case examples were given by Sarkar, and Hidayatullah, JJ. They show how similar acts in different contexts affect differently law and order on the one hand and public order on the other. It is always a question of degree of the harm and its effect upon the community. The question to ask is : Does it lead to disturbance of the current of life of the community so as to amount to a disturbance of the public order or does it affect merely an individual leaving the tranquility of the society undisturbed? This question has to be faced in every case on facts. There is no formula by which one case can be distinguished from another."

(emphasis supplied)

17. Reliance was also placed on a Three Judge Bench judgment of the Supreme Court in the case of **T. Devaki Vs. Government of Tamil Nadu and others**² wherein with reference to the previous pronouncement, the following observations were made:

18. There is a basic difference between 'Law and order' and 'public order'. The question whether a man has committed only a breach of law and order or has acted in the a manner prejudicial to public order, is a question of degree and extent of the reach of the act upon the society. It was held that a solitary assault on one individual can hardly be said to disturb public peace or place public order in jeopardy so much as to bring the case within the purview of preventive detention law. Such a solitary incident can only raise a law and order problem and no more. Applying the said position of law to the facts of the present case shows that the contention raised on behalf of the petitioner deserves to be accepted.

(emphasis supplied)

18. We may note with benefit, the concept of “public order” generally and its particular connotation under the MPDA Act. The distinction between the concepts of “public order” and “law and order” is well recognised. Public order is something more than ordinary maintenance of law and order. A proper test to distinguish between “law and order” and “public order” is whether the complained acts led to disturbance of the ordinary tempo of life of

2. (1990) 2 SCC 456.

the community so as to amount a disturbance of the public order or it merely affected an individual leaving the tranquility of society undisturbed. It is, therefore, said that the essential distinction between the concepts of “public order” and “law and order” is not in the nature or quality of the act but in the degree, potentiality and extent of its reach upon society. The given act by itself may not be determinant of its own gravity. It is the propensity and potentiality of the act of disturbing the even tempo of life of the community that renders it prejudicial to the maintenance of public order.

19. On the aforesaid touchstone, reverting to the facts of the case, it is pertinent to note that the detaining authority has professedly taken into account C.R. No. 441 of 2020 and two in-camera statements of the witnesses, to arrive at the subjective satisfaction that the detention of the petitioner was warranted so as to prevent him from acting in a manner prejudicial to the maintenance of public order. The narration of facts in para 4(a)(i) of the grounds of detention, pertaining to C.R. No. 441 of 2020, reveals that the First Informant therein and the petitioner had a business deal. The First Informant alleged that he had executed the work of filling laterite soil (murum) on the track, which was

tendered to him through the petitioner's source. Dispute arose as some payment receivable from the petitioner remained due. The First Informant further alleged that the petitioner had called him at Bhigwan for settlement of the said dispute. When he reached Bhigwan, the petitioner forcibly took him in the car at Kondhar-Chincholi road and threatened him by pointing a pistol. He was abused and assaulted by iron rod and sticks. He lost consciousness. When he regained consciousness, the petitioner threatened to eliminate him if he lodged report against the petitioner.

20. The aforesaid narration of facts, even if taken at face value, would indicate that the acts and conduct attributed to the petitioner are predominately individualistic in nature. There is no allegation, even remotely, that the First Informant was abused, assaulted and intimated in the public and the acts of the petitioner caused disturbance of the even tempo of life of ordinary citizens who happened to witness the occurrence. Conversely, the dispute between the parties over sharing the profits of the work appears to be the genesis of the said occurrence.

21. It is trite that disorderly behavior of a person in the public or commission of an offence is bound to affect the peace

prevailing in the locality to some extent and may also bear upon law and order but every such act of disorderly behavior or commission of offence does not necessarily jeopardize the maintenance of public order. This proposition governs the case at hand, with full force. The allegations made against the petitioner in C.R. No. 441 of 2020 do not transgress the realm of law and order.

22. This propels us to the consideration of confidential statements of witnesses 'A' and 'B'. Having regard to the text and tenor of the confidential statements, we deem it appropriate to extract the narration of the statements of witnesses A and B, by the competent authority in ground 4(b)(i) and 4(b)(ii), as under:

4(b)(i)- Witness A -

Witness A is residing at Bhigwan, Tal. Indapur, Dist. Pune stated that the complainant is using you tube and facebook hence he knows about you. In the second week of December, 2020, near Bhigwan, the said witness was going to Diksal to Kondar Chincholi road on his two wheeler, at near about evening; he saw two black coloured car standing on the road with 10 to 12 peoples. They are having with them iron rod and stick. That time he went there and asked why all of them stopped, whether there is a shooting of movie going on etc. Some of them came near you and said keep distance from Bhai i.e. you. Then after you threatened him that, you don't know me. I am Nilesh Ghaywal, your picture will be release here. When the witness said that he is a local of said village, he will saw by calling native peoples. Then you stated that your peoples also having terror of mine. Further you have started to beat the witness with rod and threatened him to go away from the spot. After that incidence the witness knows

that you are a well known goon of Pune City. Due to fear when the said witness going from the spot, more two three cars returned there and the peoples from eh cars threaten one person. Then after the witness ran away. Due to the terror created by you the said witness changed his daily routine life. Due to the terror the witness never filed any complaint against you until today.

4(b)(ii) Witness B -

Witness B residing at village Bhigwan Tal. Indapur, Dist. Pune stated that, in the first week of January, 2021, day not remember, when the witness is going to Jadhav Wasti, for his work. When returning to his home, at 7.30 p.m., he saw two – three black colours car standing on the road. At that time witness is alone on the road. When the witness is going to Jadhav Wasti, for his work. When returning to his home, at 7.30 p.m., he saw two- three black colours car standing on the road. At that time witness is alone on the road. When the witness asked them that whether they missing their way, one of your associate came out of the car and said that why you are asking foolish questions, go strait way, you don't know who is Nilesh Ghaywal, he is well known goon of his area. Then after one of your associate took forcefully the witness on road side and threatened him that, you don't know him ? He is well Goon of Pune city, his name is Nilesh Ghaywal. When two unknown peoples from the road asked why they took him the witness forcefully, you associate took out Koyta and threatened them also. After that incidence the witness and other peoples ran away with fear. Because of the terror the witness stopped for going to his work in evening and came early to home. Due to the terror created by you the said witness has never filed any complaint against you until today.

23. Evidently, the aforesaid narration of the statements of witnesses, recorded in camera, makes interesting reading. It seems that both the witnesses came in contact with the petitioner and his associates, out of inquisitiveness. Both witnesses claimed to

have approached the associates of the petitioner on their own. They simply came across as chance witnesses. It is not the case that the petitioner or his associates accosted the witnesses and indulged in activities which would disturb the public peace. The place of occurrence deposed to by both the witnesses also seems to be rather secluded. No element of the acts and conduct contributing to the disturbance of even tempo of life of the ordinary citizens is discernible in any of the statements relied upon by the detaining authority.

24. The situation which thus obtains is that neither the narration of facts in C.R. No. 441 of 2020 registered against the petitioner nor the confidential statements of witnesses, even if taken at their face value, justify an inference that the acts and conduct attributed to the petitioner had the propensity to cause prejudice to the maintenance of public order. On the strength of the aforesaid material it would be rather hazardous to draw an inference that the detention order is based on a reasonable prognosis of the future prejudicial behavior of the petitioner based on his antecedents, conduct and attendant circumstances.

25. There is another factor which has a critical significance. In the grounds of detention in para 4(a)(8), the detaining authority

has recorded that in the predicate offence, C.R. No. 441 of 2020, the petitioner was ordered to be released on bail in the event of his arrest by the learned Additional Sessions Judge, Baramati. Accordingly, the petitioner was arrested and released on bail. Secondly, the grounds of detention also refer to the initiation of prohibitory action against the petitioner and passing of externment order under section 56(1)(a) and (b) of the Maharashtra Police Act, 1951 thereby externing the petitioner from the limits of Commissionerate of Police, Pune for two years i.e. from 9th November, 2020 to 9th November, 2022. It is further recorded that said externment order was set aside by the appellate authority namely Divisional Commissioner by an order dated 18th December, 2020. These two factors give heft to the submission of Mr. Joshi that the proceedings for detention was designedly initiated by the authority, only after the petitioner was granted pre-arrest bail by the Additional Sessions Judge and externment order was quashed and set aside by the Divisional Commissioner.

26. In the grounds of detention, the detaining authority adverted to other crimes registered against the petitioner at Koregaon Park and Lakshar police stations, in the year 2017. However, the detaining authority claimed that it had not taken into

account those offences while passing the order of detention. The learned APP would urge that those facts were referred to in order to demonstrate the antecedents of the petitioner and those facts did not influence the decision of the detaining authority in arriving at the subjective satisfaction.

27. Such course of referring to the criminal conduct of a detenu and claiming that the detaining authority was not influenced by such antecedents, is fraught with infirmity. In a recent decision in the case of **Khaja Bilal Ahmed vs. State of Telangana and Ors.**³ the Supreme Court highlighted the fallacy in such submission, in para 23, as under:

23. In the present case, the order of detention states that the fourteen cases were referred to demonstrate the “antecedent criminal history and conduct of the appellant”. The order of detention records that a “rowdy sheet” is being maintained at PS Rain Bazar of Hyderabad City and the appellant “could not mend his criminal way of life” and continued to indulge in similar offences after being released on bail. In the counter affidavit filed before the High Court, the detaining authority recorded that these cases were “referred by way of his criminal background... (and) are not relied upon”. The detaining authority stated that the cases which were registered against the appellant between 2009 and 2016 “are not at all considered for passing the detention order” and were “referred by way of his criminal background only”. This averment is plainly contradictory. The order of detention does, as a matter of fact, refer to the criminal cases which were instituted between 2007 and 2016. In order to overcome the objection that

3 (2020) 13 Supreme Court Cases 632.

these cases are stale and do not provide a live link with the order of detention, it was contended that they were not relied on but were referred to only to indicate the antecedent background of the detenu. If the pending cases were not considered for passing the order of detention, it defies logic as to why they were referred to in the first place in the order of detention. The purpose of the Telangana Offenders Act 1986 is to prevent any person from acting in a manner prejudicial to the maintenance of public order. For this purpose, Section 3 prescribes that the detaining authority must be satisfied that the person to be detained is likely to indulge in illegal activities in the future and act in a manner prejudicial to the maintenance of public order. The satisfaction to be arrived at by the detaining authority must not be based on irrelevant or invalid grounds. It must be arrived at on the basis of relevant material; material which is not stale and has a live link with the satisfaction of the detaining authority. The order of detention may refer to the previous criminal antecedents only if they have a direct nexus or link with the immediate need to detain an individual. If the previous criminal activities of the appellant could indicate his tendency or inclination to act in a manner prejudicial to the maintenance of public order, then it may have a bearing on the subjective satisfaction of the detaining authority. However, in the absence of a clear indication of a causal connection, a mere reference to the pending criminal cases cannot account for the requirements of Section 3. It is not open to the detaining authority to simply refer to stale incidents and hold them as the basis of an order of detention. Such stale material will have no bearing on the probability of the detenu engaging in prejudicial activities in the future.

(emphasis supplied)

28. In the totality of the circumstances, in our view, there is no material which would justify the inference that the activities indulged in by the petitioner were prejudicial to the maintenance of public order. At the cost of repetition, we record that preventive

detention which impinges upon the most precious and prized personal liberty of a citizen, cannot be resorted to as an easy substitute for dealing with ordinary law and order problem. Since, the detention order deserves to be quashed and set aside on this substantive ground, in our view, it may not be necessary to deal with the other grounds sought to be urged on behalf of the petitioner.

29. Before parting, by way of abundant caution, we clarify that the observations hereinabove are made to test the legality and correctness of the impugned order of detention and they may not be construed as an expression of opinion on the merits of the proceedings which are pending before the competent Court and those proceeding shall be determined uninfluenced by the aforesaid observations.

30. For the foregoing reasons, the petition deserves to be allowed. Hence, the following order.

ORDER

- a] The petition stands allowed.
- b] The impugned order dated 2nd March, 2021 passed by the District Magistrate, Pune -respondent No. 2 stands quashed and set aside.

- c] The petitioner be set at liberty forthwith if not required to be detained in any other case.
- d] Rule made absolute in aforesaid terms.

(N.J. JAMADAR, J.)

(S.S. SHINDE, J.)